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No. 99-1559

In The

United States Supreme Court

OCTOBER TERM, 1999

JOAN YUKINS, *Warden,*

Petitioner,

v.

STACEY BARKER,

Respondent.

On Petition for Writ of Certiorari to the United States Court ofAppeals for the Sixth Circuit

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RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHERE MICHIGAN PLACES ONLY THE BURDEN OF PRODUCTION (NOT PERSUASION) TO SHOW SOME EVIDENCE OF SELF-DEFENSE, ARE MICHIGAN COURTS CONSTITUTIONALLY OBLIGATED TO INSTRUCT A JURY ON THE DEFENSE WHERE IT IS UNDISPUTED THAT THE THRESHOLD WAS MET?

II. DID THE SIXTH CIRCUIT CORRECTLY DETERMINE THAT THE INSTRUCTIONAL ERROR WAS HARMFUL TO MS. BARKER WHERE IT PREVENTED HER VERSION OF EVENTS FROM BEING CONSIDERED BY THE JURY AND WHERE THERE WAS EVIDENCE WHICH (IF BELIEVED) WOULD CONSTITUTE A FULL AND COMPLETE DEFENSE?

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Comment, *Making the Women's Experience Relevant to Rape: The Admissibility of Rape Trauma Syndrome in California*, 39 U.C.L.A. L. REV. 251 (1991) 25

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COUNTER-STATEMENT OF CASE

In a November 1987 jury trial before Judge Fred Mester of Michigan's Oakland County Circuit Court, Respondent Stacey Barker was convicted of first-degree murder, MCL 760.3 16; MSA 28.548, in the death of a retired Lutheran minister, Frank Madsen. This was a second trial, the first having resulted in a

convicted as charged. She is currently serving a nonparolable life sentence under the custody of the Michigan Department of Corrections. Petitioner is the warden of the prison where she is housed.

A. *Trial Court Proceedings.*

In his opening remarks to the jury, defense counsel stated that the inferences to be drawn from the facts and not the facts themselves, were in dispute in this case, and that Ms. Barker killed Frank Madsen in self-defense after Mr. Madsen made sexual advances towards her (T II 67).

The first trial witness was the Oakland County medical examiner, Dr. William Brooks. Dr. Brooks testified that he performed an autopsy on 81 year old Frank Madsen on November 7, 1986. He observed ten lacerations to the head generated by blows with a blunt object. All the head wounds were shallow (T II 19-22). Two autopsy photographs were introduced into evidence over previously noted defense objection (T II 24). Dr. Brooks testified that the deceased was wearing several items of jewelry, and there was no evidence that anyone had tried to remove the jewelry (T II 25, 41). There were abrasive injuries to the bridge of the nose, the eye, the left cheek and the jaw (T II 26). There was a cluster of 32 stab wounds in the area of the left arm pit and shoulder blade (T II 27-28). There were three additional surface stab wounds to the right shoulder and left arm, and there were scratches across Mr. Madsen's chest and scrapes on his knuckles (T II 29-30). Several stab wounds had perforated the lung and rib cage causing death (T II 32-33). Dr. Brooks speculated that Mr. Madsen was struck about the head and face before he was stabbed and that he was not moving when he was stabbed (T II 35, 52). Dr. Brooks placed the time of death as the evening of November 5, 1986, and stated that he was unable to determine

Janice Davis testified that in November of 1986 she was working as a housekeeper at the Franklin Club Apartments, a Southfield senior citizens' complex, where she cleaned Mr. Madsen's apartment every day (T III 16). On November 5, she noticed that several drawers in the apartment were open. and she closed them as she cleaned. On November 6, she entered the apartment through the normally unlocked door and found Mr. Madsen lying dead on the kitchen floor (T III 10-13). Ms. Davis testified that she knew Defendant Barker worked as a companion to a woman who lived on the same hallway as Mr. Madsen, and she had seen Ms. Barker go into the Madsen apartment a couple of times (T III 15-16, 22). Ms. Davis testified that Mr. Madsen walked slowly with a cane, smoked cigarettes and wore glasses (T III 18). She described him as "a strong man, a big man" (T III 24).

Dr. Marshall Sach, Mr. Madsen's personal physician, testified that when he last saw his patient in October of 1986, Mr. Madsen was six feet tall, weighed 200 pounds, and was suffering from several medical problems including poor circulation in one leg and "organic brain syndrome" or senile dementia, which caused short-term memory loss (T III 28-3 0, 39). Dr. Sach testified that Mr. Madsen had problems with balance and walked with a cane. On October 29, Mr. Madsen told him that he had slipped on some wet grass two days earlier and had bruised his left knee and thigh (T III 31, 34).

Audrey Warren testified that she and Mr. Madsen were friends for forty years, and that approximately two days before his death she observed him with $300 in cash (T III 79, 83). On one unspecified occasion in the past, he asked her to get some money out of a ledger book which was located in a desk drawer in his bedroom (T III 86-87). Two and a half years before his death, Mr. Madsen told Ms. Warren that he was impotent (T III 89-90).

The parties stipulated that Mr. Madsen's wallet was found in his apartment at the time his body was discovered. The wallet contained $61 in cash and a card with Ms. Barker's telephone number written on it (T III 94-95).

Mr. Madsen's daughter, Arlayne Lewis, testified that her father's last withdrawal from his checking account was $200.00 on October 27, 1986 (T III 115). Ms. Lewis testified that her father was an affectionate man, and women had called him a "great kisser." He was able to drive his own car. She did not believe he was in the habit of keeping large amounts of cash in his apartment (T IV 11, 16). Mr. Madsen's son-in-law, Herbert Lewis, testified that Mr. Madsen walked with a cane for the year and a half before his death (T IV 27).

Melvin Paunovich, of the Southfield Police Department crime laboratory, testified that during his investigation of the scene he found a cane, a knife, a pair of glasses and a cigarette near the body. He took numerous blood samples, including one from a bloody towel in the bathroom sink where the water was still running. He found a partial palm print in blood on the top of the stove and later determined that the palm print was that of Stacey Barker (T IV 32-33, 36-37, 40). A desk drawer in the bedroom was partially open, with a ledger book and $8.00 in Canadian money inside the drawer in plain view. There was no blood on the drawer or its contents (T IV 50, 70-71). Mr. Madsen's wallet was on a table near the front door of the apartment. The wallet contained $61 in cash and had no blood on it (T IV 51). Sergeant Paunovich testified that there was no total ransacking of the apartment, and that the deceased's belt buckle was at the side of his pants and not in the belt loop and that his pants were partially pulled down (T IV 52, 55-56).

Detective Lowell Moore of the Southfield Police Department testified that he directed a video taping of the

apartment. The video was played for the jury over defense objection (T IV 66-67). As the tape was played, Detective Moore described the scene including spots of blood that were found on the deceased as well as in areas of the kitchen, bedroom and bathroom (T IV 72-74). Detective Moore testified that he first interviewed Stacey Barker on February 10, 1987. She told him that she met Reverend Madsen while working for another resident. They became friends. He invited her to his apartment several times, and they went out to lunch and dinner together. On occasion, he paid her for cleaning his apartment. She last saw him on October 31, or November 1, 1986 (T IV 78-82), Ms. Barker made a second statement after she was arrested on May 7, 1987, following police receipt of the palm print results (T IV 83-84, 94). That statement was read into the trial record, but was not transcribed. However, the same statement was transcribed when it was read at the preliminary examination. In it, Ms. Barker testified that on November 6, Mr. Madsen telephoned her and asked her to visit him. She did, and they began the evening by watching television. Masden called Ms. Barker and asked her to come over and visit him, which she did. They initially spoke and watched some television together. He then came to the couch she was sitting on and started touching her without her consent. Initially, Ms. Barker had not taken the matter seriously because Mr. Masden had earlier told Ms. Barker that he was impotent.

Ms. Barker stated that she had been told by her aunt "and a lot of different ladies at Franklin Club" that she should stay away from him because he was a "dirty old man," (PET 87-94). Ms. Barker did not follow this warning because she thought he was nice and her instincts believed that "he just needed company." The deceased then told her that he had spent money on Ms. Barker and it was time that she started "being nice to him." Ms. Barker then testified that the conflict progressed and Mr. Masden get "pawing all over me and then he came behind

me and he was grabbing me, telling me he wasn't gonna let me go and I really got scared because I had been raped before and I had to see a rape counselor and I just didn't want it to happen again." Ms. Barker then testified in detail to Mr. Masden's efforts to forcefully disrobe her. At that point during the struggle, Ms. Barker grabbed a statue from Mr. Masden's counter and hit him with it. Ms. Barker then testified to taking a knife from someplace in the kitchen and described the following:

> And I started crying and it seemed like everything was blurry. I just didn't even know him. I didn't even know myself. All I could think about was when I was being raped and beaten a few years before that and started stabbing him and he still wouldn't let me go and he took the knife from me.
>
> He was on top of me. You know, it was like he was trying to hunch on me, like hump on me, and I just kept saying -- I just remember I was saying please stop, don't do this to me, you don't have to do this to me, Frank, please stop. Then he grabbed, he took the knife from me and for a minute I thought, you know, after I stabbed him he was going to try to stab me because I had stabbed him and so I tried to grab the knife back and that's when my finger got cut...
>
> Now like when I move this hand and I do like this, you see how my finger can curve, this finger won't even curve. I think I might have cut a nerve or something...
>
> [I]t was really deep, it was wide open. And I said look what you did to me and he saw it and he was still smirking and by that time he had dropped the

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the following instruction to the jury on self-defense:

> One of the defenses raised in this case is that the Defendant acted in lawful self-defense. That law recognizes the right of a person to use force or even take a life in defense of his own person under certain circumstances.
>
> When persons act in lawful self defense, such acts are excused and Defendant is not guilty of any crime.
>
> In considering whether or not the Defendant acted in lawful self-defense, you should consider all of the evidence in light of the following rules:
>
> First, at the time of the act, the Defendant must have believed he was in danger of being killed or of receiving serious bodily harm. If he so believes, he may immediately act and defend himself, even to the extent of taking a human life if necessary. Although it may turn out that the appearances were false and that he was mistaken as to the extent of the real danger, he is to be judged by circumstances as they appeared to him at the time of the act.
>
> Second, the degree of danger which must be feared is serious bodily harm or death. A person is not justified in killing or inflicting bodily injury upon another to protect himself from what appears to be slight or insignificant injury. Deciding whether at the time the Defendant feared for his life or safety, you should consider

all the surrounding circumstances, the conditions of the parties, including their relative strength, whether the other party was armed with any dangerous weapon, or had other means to injure the Defendant, the nature of the threat of or attack of the other party, previous acts of brutality or threats of the other party which the Defendant was aware.

Third, the act or acts taken by the Defendant must be apparent to the Defendant at the time, to be immediately necessary. A person is justified in using only such amount of force as may appear necessary at the time to defend himself from danger. In considering whether the degree of force appeared to be necessary, you should consider the excitement of the moment, what alternatives the Defendant knew existed. A defendant in a state of excitement is not held to fine distinctions of judgment about how much force is necessary to use to protect himself.

Now, the law requires a person to avoid using deadly force if he can safely do so. If the Defendant could have safely retreated but did not do so, his failure to retreat is a circumstance which you may consider, together with all other circumstances, in determining whether he went further in repelling the danger than he was justified in doing.

However, if the defendant believed that he was in danger of death or seriously bodily injuries and that deadly force was immediately necessary to repel such danger, he was not

> required to retreat or to consider whether he could safely retreat. He was entitled to stand his ground and use such force as he believed immediately necessary to protect his person.
>
> The Defendant is not required to prove that he acted in self-defense. The prosecution has the burden of proof beyond a reasonable doubt, and this includes the responsibility of providing that the Defendant was not acting in self-defense.

(TT VI 16-19). After the jury returned a verdict of guilty of first-degree murder, defense counsel requested a psychiatric referral for his client (T VI 24, 26-27).

C. *Post-Conviction Proceedings.*

On December 4, 1987, the court sentenced Ms. Barker to the mandatory life term (ST 8).

Ms. Barker appealed her conviction through the Michigan Courts squarely presenting the question of whether she was denied her rights to due process of law and the presumption of innocence when the state court refused to give the jury an instruction that she had the right to use lethal force to resist a sexual assault. The Michigan Court of Appeals treated Ms. Barker's claim as a claim that she was denied a "fair trial" through the deprivation of this instruction.[1] Disagreeing with another Court of Appeals decision, the Court found that there was no right to a special instruction on this issue, *Id.* Judge Kelly dissented from this holding stating that Ms. Barker was "entitled to have the jury specifically instructed that she had the

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[1]People v. Barker, 179 Mich App. 702, 446 NW2d 549 (1989) (Pet.App. 59a).

right to defend herself from being raped by using force, including deadly force." Pet. App. at 63a.

On the defense appeal to the Michigan Supreme Court, the Michigan Supreme Court granted leave to appeal limited to the question of "whether the trial judge erred reversibly by refusing to instruct the jury that the defendant was entitled to use deadly force to resist a sexual assault."[2]

On appeal, Ms. Barker briefed the constitutional issue presented to the federal courts. When the Michigan Supreme Court handed down its decision, the Court found that the jury instruction should have been given, but declined to reverse finding the error harmless based on the belief that the "evidence thoroughly contradicted the defendant's version of how and why she killed the elderly and infirm victim," (Pet. App. 45a).

Justice Levin dissented from this finding that there was significant evidence to support the Defendant's version of the offense finding that the majority's harmless error analysis was was in error. Justice Levin believed that the majority's opinion impermissibly assumed that the deceased's age standing alone made him incapable of posing a credible threat to Ms. Barker. Justice Levin cited several scholarly works for suggesting that this was not the case.[3] Justice Levin proceeded to note that the evidence at the crime scene was consistent with a sudden affray, that there was no record support for the assertion that the victim was crawling away as asserted by the Court of Appeals,

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[2]People v. Barker, 435 Mich. 867, 457 N.W.2d 691, (1991) (Pet. App. 43 a).

[3]Pet. App. 46a (citing Rosenfeld *Prolongevity II* (New York, Alfred A. Knopf, *1985);* and, Masters, Johnson, & Kolodny, *Human Sexuality* (Boston: Little, Brown & Co., 1982) p. 170).

Petitioner subsequently brought a habeas corpus action in the United States District Court for the Eastern District of Michigan. The action was denied at the lower court level, but reversed on appeal.

On December 15, 1999, a unanimous panel of the Sixth Circuit reversed the District Court.[4] The Court found that Ms. Barker had a constitutional right to have the jury charged with instructions regarding her defense, and that the Michigan Supreme Court had acted unreasonably in upholding Ms. Barker's conviction on the theory that it believed the prosecution's witnesses and disbelieved the defense witnesses.

The Warden has sought certiorari in this matter. This is Ms. Barker's opposition.

REASONS FOR DENYING WRIT

I. WHERE MICHIGAN PLACES ONLY THE BURDEN OF PRODUCTION (NOT PERSUASION) TO SHOW SOME EVIDENCE OF SELF-DEFENSE, *GILMORE V. TAYLOR*, 508 U.S. 333 (1993) IS NOT IMPLICATED.

Petitioner contends that the question of whether this Court's statement in *Gilmore v. Taylor*, 508 U.S. 333 (1993) that an instructional error in an affirmative defense cannot implicate the due process clause is an important question which this Court should review. While this is an interesting abstract question, it is not implicated here because self-defense is not a true affirmative defense in Michigan. Michigan law places the burden of going forward on a self-defense claim on the defense. Once some evidence of self-defense is presented, the State is

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[4]Barker v. Yukins, 199 F.3d 867 (6th Cir. 1999).

required to disprove the defense beyond a reasonable doubt. *See People v. Turong*, 218 Mich. App. 325, 553 N.W.2d 692 (1996); *People v. Fortson*, 202 Mich.App. 13, 19-20, 507 N.W.2d 763 (1993); *People v. Heflin*, 434 Mich 482, 502, 456 NW2d 10(1990).

There is no doubt that a state may normally decide what factors are substantive element so of an offense and what factors are affirmative defenses.[5] A state is then free to allocate the burden of production and the burden of persuasion accordingly. *Martin v. Ohio*, 480 U.S. 228 (1987). While under *Martin*, Michigan *could* shift the burden to the Defendant to prove self-defense, *they did not.* Ms. Barker was only required to come forward with evidence to put the issue in dispute.[6] The Michigan Supreme Court has expressly found that she met this burden. *See* 437 at 162, 468 N.W.2d at 493, Pet. App. 44a ("in the present case, there was both a request and an evidentiary basis for such an instruction, and it should have been given").

Gilmore v. Lynch, 508 U.S. 333 (1993), does not alter the argument made in this case. *Gilmore* specifically says that it was only deciding the question of whether the lower court had applied a new rule of law on habeas corpus in violation of the principles set forth in *Teague v. Lane*, 489 U.S. 288 (1989). "[T]he retroactivity of *Falconer [v. Lane*, 905 F.2d 1129 (7th Cir. 1990)] is *the only question before us in this case.*" *Gilmore*, 113 5. Ct. at 2116 (emphasis added). This Court went

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[5]In Morrison v. California, 291 U.S. 82 (1934), the Court found that in extreme cases, a state could violate due process by unfairly shifting a critical element of the case to the defense. *See also* Jones v. United States, 526 U.S. 227, 238 (1999). Respondent does not argue that *Morrison* is implicated in this case.

[6]*See, e.g. Gilmore*, 508 U.S. at 351 (O'Connor, J.) (distinguishing between burden of proof and burden of production).

on to note that the State's argument that the jury instruction error was only one of state law was one which the Court "need not address." *Id.* at 2217 n.4. Similarly, the concurring and dissenting justices in that case expressly undercut such a reading. Justices O'Connor and White concurred specifically noting that "I do not join in the Court's opinion. . . because it could be read (wrongly, in my view) as suggesting that the Court of Appeal's decision in this case applied not only a new rule, but also an incorrect one"). Justices Blackmun and Stevens criticized the majority for failing to reach the issue of whether the instructions violated due process. *See also Thomas v. Peters,* 48 F.3d 1000 (7th Cir. 1995) (recognizing that *Gilmore* did not decide the merits of the question of whether defective defense instructions are solely a state law issue).

Moreover, in *Gilmore* the State conceded that the due process clause was implicated where the jury instructions had the effect of reducing their burden of proof on an element of the offense which they were obligated to prove under *In re Winship,* 397 U.S. 358 (1970). *See* 508 U.S. at 340 (the state argues that any error "with respect an affirmative defense, *which does not lessen the State's Winship burden in proving every element of the offense* charged beyond a reasonable doubt, is wholly of state law").[7]

The Warden's argument that the a criminal defendant's

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[7]This Court has previously criticized such attempts to artificially limit the concept of what is an element of an offense. In *Jones,* this Court held that such an approach was highly disfavored because it giving the state "an unlimited choice over characterizing a stated fact as an element would leave th State substantially free to manipulate its way out of *Winship," Id.* at 241.

right to subpoena defense witnesses,[8] present their testimony,[9] and the right of a defendant to testify in his or her own behalf[10] would be reduced to a hollow formality if the state was free to exclude the defense from the jury. In *Washington v. Texas,* 388 U.S. 14 ,19 (1967), this Court rejected such a hollow construction when it noted: "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."[11] This Court recognized in *Spurr v. United States,* 174 U.S. 728, 735 (1899), when a defendant is "entitled to the full benefit of [a] defense," it is "vital" that the

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[8]*See* Webb v. Texas, 409 U.S. 95, 98 (1972) (reversing conviction based on state judge's interference with the defendant's right "to present his own witnesses to establish a defense").

[9]Chambers v. Mississippi, 410 U.S. 284 (1973).

[10]Rock v. Arkansas, 483 U.S. 44 (1987). *See also* Crane v. Kentucky, 476 U.S. 683, 690 (1986) (discussing constitutional guarantee of a "meaningful opportunity to present a complete defense" and "an opportunity to be heard"); California v. Trombetta, 467 U.S. 479, 485 (1984).

[11]As the Ninth Circuit has recognized: "a failure to instruct the jury regarding the defendant's theory of the case precludes the jury from considering the defendant' defense to the charges against him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed. . . will entitle the defendant to a judgment of acquittal." United States v. Escobar de Bright, 742 F.2d 1196, 1201-1202 (9th Cir. 1984). *See also* United States v. Plaft, 435 F.2d 789, 792 (2d Cir. 1970) ("[A] defendant is "entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no mafter how weak or incredible. . ."); United States v. Alfonso-Perez, *535* F.2d 1362, 1365 (2d Cir. 1976); United States v. Hicks, 748 F.2d 854, 857-58 (4th Cir. 1984) (failure to instruct on alibi violated due process); Conde v. Henry, 198 F.3d 734, 739-740 & n.5 (9th Cir. 1999) (failure to instruct on defendant's theory violated due process).

jury be properly instructed. *See also Hickory v. United States,* 160 U.S. 408, 423 (1896) ("when there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially"). Failing to submit a defense to the jury is the functional equivalent of a direct verdict for the prosecution in a criminal case, a verdict which has been squarely rejected by this Court. *See United States v. Martin Linen Supply Corp,* 430 U.S. 564, 573 (1977); *United Brotherhood of Carpenters v. United States,* 330 U.S. 395, 408 (1947); *Sparf & Hansen v. United States,* 156 U.S. 51, 105-06 (1895).

This error robbed Ms. Barker of her defense. As the Sixth Circuit correctly noted:

> Barker's sole defense is that she killed the victim in order to prevent an imminent rape. The trial court's refusal to instruct the jury that a defendant has the right to use force, even deadly force, to resist a rape clearly goes to the very essence of Barker's claim of self defense. In this case, a juror may have reasonably interpreted the general self defense instruction to require Petitioner to demonstrate that: (1) a rape was imminent; and (2) that rape would have led to death or serious bodily injury. Michigan law, however, requires only that a defendant who used self defense to resist an imminent rape to demonstrate the former. By adding what is effectively another element to Petitioner's burden, the general self defense instruction undermined Barker's defense. Petitioner simply cannot be considered to have had a meaningful opportunity to present a complete defense when the jury was so plainly misinstructed on a matter critical to her defense. That the self defense instruction at issue is

> vitally important to a full and vigorous defense is underscored by the fact that Michigan law itself requires the instruction be given when there is a sufficient evidentiary basis to show that the defendant used self defense to prevent a rape. Instead of having a meaningful opportunity to present a full and vigorous defense, then, Petitioner's claim of self defense was significantly impeded and her due process rights to present a defense severely prejudiced.

See also State v. Miller, 186 Conn 654, 660, 443 A.2d 906 (1982) (finding a deprivation of the right to a defense by refusing to submit a properly supported defense to the jury); *State v. Wanrow*, 88 Wash. 2d 221, *559* P.2d 548, *559* (1977) (finding a deprivation of the right to a defense on similar facts to the instant case); *Zemina v. Solem*, 438 F.Supp. 455, 466-470 (D.S.D. 1977), *aff'd*, 573 F.2d 1027 (8th Cir. 1978) (erroneous jury instruction which went to defendant's theory of defense supported a finding of constitutional error); *Miller v. South Dakota*, 338 N.W.2d 673, 676 (S.D. 1983) (although errors in instructing the jury do not always rise to a constitutional level, "if the error goes to the heart of a defendant's theory of defense it can infringe upon defendant's rights to due process and jury trial.")

The decision below is clearly supported by ample precedent. Petitioner's request for certiorari should be denied.

II. THE INSTRUCTIONAL ERROR WAS CLEARLY HARMFUL TO MS. BARKER WHERE IT PREVENTED HER VERSION OF EVENTS FROM BEING CONSIDERED BY THE JURY.

The Michigan Supreme Court found that Ms. Barker's defense should have been submitted to the jury. The Court, however, found the error in this case harmless because the Court believed that "no reasonable juror would have believed the defendant's claim of self-defense." The Court's opinion did not offer detailed analysis, but instead adopted Judge Kelly's concurrence in the Court of Appeals. (Pet. App. 45a). Judge Kelly's opinion cited no case law for her analysis and simply recited that based on the nature of the crime, "no reasonable juror could have believed such force was necessary to prevent rape by the enfeebled deceased." No cases were cited in support of this analysis and Petitioner has pointed to no Michigan cases which had previously held that an appellate court may resolve witness credibility in applying the harmless error analysis required in constitutional questions under *Chapman v. California*, 386 U.S. 18, 23-24 (1967).[12]

The Warden believes that this is a state ruling on the merits entitled to deference under 28 U.S.C. §2254(d)(l). The Respondent disagrees. While the question of what was the appropriate standard of deference in petitions for habeas corpus

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[12]While Respondent argues that the Michigan Supreme Court unreasonably applied *Chapman*, even under the standard set forth in Brecht v. Abrahamson, 507 U.S. 619 (1993), the appellate credibility determinations complained of in this brief would be improper. *See* Smith v. Horn, 120 F.3d 400, 418-419 (3rd Cir. 1997) ("we cannot assume that the jury, having found Smith guilty, "believed all properly admitted evidence against him and disbelieved all evidence in his favor") (quoting Roger J. Traynor, THE RIDDLE OF THE HARMLESS ERROR (1970).

that post-dated the Anti-Terrorism and Effective Death Penalty Act. 28 U.S.C. §2254 (1994 ed., Supp III) (quoted in the footnote)[13] was once an important open question of law. It has been resolved since the filing of the Petitioner's petition.

Just two weeks ago, this Court resolved this question in *Taylor v. Williams,* ___ U.S. ___ , 2000 U.S. LEXIS 2837 (April 18, 2000). There, this Court adopted a standard of review aimed at giving full meaning to the deference provisions of the Anti-Terrorism Act. The Court held that:

> The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the petitioner's habeas case.
>
> The "all reasonable jurists" standard would tend to mislead the habeas court by focusing their attention on a subjective inquiry rather than on an objective one.

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[13]The pertinent provision provides:

> (a) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the claim —
>
> (1) resulted in a decision that was contrary to, or invoked an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

This standard of review is actually more favorable to Ms. Barker than the standard of review applied by the Sixth Circuit in this case. The Sixth Circuit had previously utilized the reasonable jurists standard.[14] This Court's opinion rejects the this standard in favor of an objective reasonable test.[15]

Further, careful review of the Taylor case demonstrates that the degree of review that the Sixth Circuit applied to the Michigan Supreme Court did not exceed that mandated by *Taylor*. In *Taylor*, the Virginia Supreme Court wrote a relatively thoughtful opinion defending its position. *Williams v Warden*, 254 Va. 16, 487 S.E.2d 194 (1997). The Court examined the facts at some length, 487 S.E.2d at 195-197, 199-200. The Court, then correctly identified *Strickland v. Washington*, 466 U.S. 668 (1987) as the controlling case for

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[14]*See* Pet. App. 7a ("[t]hus, in the Sixth Circuit, a state court's application of federal law is unreasonable and a writ may issue only if reasonable jurists would find it so arbitrary, unsupported or offensive to existing precedent as to fall outside the realm of plausible credible outcomes"). *See also* Nevers v. Killinger, 169 F.3d 352, 362 (6th Cir.), *cert denied*, ___ U.S. ___, 119 S. Ct. 2340 (1999).

[15]It should also be noted that the Michigan Supreme Court ruling and that the Michigan Court of Appeals ruling did not apply a careful application of law to facts in this case. The Court assumed a key question in this case without discussion or analysis (e.g. that it could resolve disputed factual questions which were never submitted to the jury). Under these circumstances, it is unclear whether there was a state interpretation of federal law to defer to. In Lindh v. Murphy, 96 F.3d 856, 871 (7th Cir. 1996), Judge Easterbrook writing for the Court held that in determining whether a state court's interpretation of federal law was reasonable, the Court should take into account whether a "reasonable, thoughtful answer [was] reached after a full opportunity to litigate the issues." A decision which does not possess these qualities may not meet this test. *See also* M.J. Hartman and J. Nydern, *Habeas Corpus and the New Federalist After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 363 (1997).

ineffective assistance of counsel claims. The Court recognized the basic test under Strickland (e.g. that there must be a deficiency in representation with actual prejudice resulting). Relying on additional Supreme Court cases, the Court stated that the standard was demanding, but "by no means insurmountable." Id. at 198 (quoting *Kimmelman v. Morrison*, 477 U.S. 365 (1986)).

Speaking to the prejudice component, the Court stated that "an analysis focusing solely on mere outcome determination, without result of the proceeding was fundamentally unfair or reliable." Id. at 198 (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369)). Continuing to quote from the *Lockhart* decision, the Court stated that a focus solely on outcome determination without looking at the totality of circumstances would give the criminal defendant and unnecessary windfall. Id. In reversing, this Court found that the decision was an overreading of *Lockhart* and that the decision had not displaced the *Strickland* causation standard. Therefore, the Court reversed. Even though the Virginia Supreme Court probably spent a great deal of time drafting its opinion and the decision was certainly the product of both research and a careful review of the record, the Court found that the interpretation was unreasonable. Thus, it is clear under the degree of scrutiny applied under Taylor the same result would have occured here. In this case, it was clear that there was a sharp disagreement regarding the facts of this case. Petitioner makes the mistake of reviewing the evidence in a light most favorable to the prosecution, even though the jury probably never considered this highly relevant and disputed issue.

As the Sixth Circuit correctly recognized:

> In this matter, the only thing of which this court is certain is that the erroneous jury instruction left the

door wide open [for the jury to not consider the Respondent's defense]. A reasonable juror could have very well walked through the door and rejected Barker's claim for self defense because that juror believed that Madsen's assault would not have led to death or serious bodily injury, thereby resulting in a substantial and injurious influence on the verdict. Since there is grave doubt as to whether the erroneous jury instruction created a substantial and injurious influence on the verdict, the error was not harmless. Accordingly, then, the Michigan Supreme Court engaged in an unreasonable application of Chapman's harmless error test, and under § 2254(d), a writ of habeas corpus should issue.

We further believe that the Michigan Supreme Court improperly invaded the province of the jury in determining that, although the general self defense instruction was erroneous in Barker's case, the error was harmless because no reasonable juror could have believed that the force used by Barker was necessary to prevent rape by an 81-year old "enfeebled" man. The Sixth Amendment and the Due Process clause guarantee a defendant's constitutional right to a trial by jury. As the Supreme Court has recognized, the Sixth Amendment protects the defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" This right is further interpreted as prohibiting judges from weighing evidence and making credibility determinations, leaving these functions for the jury.. However, that is precisely

> what the Michigan Supreme Court did by finding that the erroneous jury instruction was harmless because no reasonable juror would have believed Barker's claim of self defense. First, the Michigan Supreme Court asserted that because the victim received ten blows to the head and was stabbed thirty two times, no reasonable juror would have believed that such force was necessary to resist a sexual assault by an "enfeebled" victim. See id. However, there was sufficient evidence in the record which might have supported rational conclusions to the contrary. In particular, Barker's testimony might support an inference that she stabbed the victim in such a frenzy because he persisted in his attack despite her struggle and numerous protests. Yet, the Michigan Supreme Court must have wholly discredited this testimony in arriving at its conclusion that the amount of force used was unjustified. Similarly, the court's conclusion that the victim was "enfeebled" rejects testimony to the contrary which established that although the victim walked with a cane, he was "a strong man, a big man."

The Michigan Supreme Court's sorting of evidence in this matter (e.g. determining what evidence it personally believed) violated Ms. Barker's right to a have a jury determine her guilt under *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). *See also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 446 (1978). A court is not permitted to affirm a defendant's conviction on a theory not presented to the jury. *See Dunn v. United States*, 442 U.S. 100 (1979); *United States v. Angiulo*, 897 F2d 1169, 1196-97 (1st Cir. 1990); *Oritz v. Dubois*, 19 F.3d 708 (1st Cir. 1994). Ms. Barker had a right to "trial by jury as opposed to trial by appellate court." *Oritz, supra.*

Since *Bollenbach v. United States*, 326 U.S. 607 (1946), the question in reviewing defective jury instructions has not been whether a Court personally believes a criminal defendant guilty, but whether the conviction was arrived at in an appropriate manner by a jury who was properly instructed. In rejecting a similar argument by the Court, Justice Frankfurter wrote for the Court in *Bollenbach*:

> In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.

326 U.S. at 607. *Bollenbach* is still good law. *See Weeks v. Angelone*, __ U.S. ___, 120 S. Ct. 727 (2000).

The jury instructions in this case denied Ms. Barker her defense. The jury was free to debate how debilitating a given sexual assault would be to a particular defendant[16] rather than

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[16]The laundry list of the injuries (both physical and psychological) which a woman faces from a sexual assault are both numerous and well documented. *See, e.g.* People v. Superior Court (Duval), 198 Cal. App. 3d 1121, 244 Cal. Rptr. 522 (1988); People v Johnson, 181 Cal. 3d 1137, 225 Cal Rptr. 251 (1986); Burgell and Holstrom, "Rape Trauma Syndrome" in FORCIBLE RAPE: THE CRIME, THE VICTIM AND THE OFFENDER, (D. Chappell and R. Geis, G. Geis, ed. 1977); S. Brownmiler, AGAINST OUR WILL: MEN, WOMEN, AND RAPE, Chapter 10 (1975); Comment, *Making the Women's Experience Relevant to Rape: The Admissibility of Rape Trauma Syndrome in California*, 39 U.C.L.A. L. REV. 251 (1991).

(continued...)

recognizing Ms. Barker's inherent right to use lethal force to resist an assault. The error was affirmatively harmful to her. As the Washington Supreme Court ruled in reversing a similar conviction:

> The respondent was entitled to have the jury consider actions in light of her own perceptions of the situation, including the perceptions which were the product of our nation's "long and unfortunate history of sex discrimination." Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right ot have their conduct judged in light of the individual physical handicaps which are the product of sex discrmination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.

State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548, 559 (1977). The Sixth Circuit's ruling below was correct. The instructions given to the jury in this case were such that they were left guessing whether a sexual assault which "only" resulted in serious emotional or psychological injury would be adequate to resist with lethal force. This was error. The error was not harmless because it permitted her to be convicted without consideration of her defense. The Michigan Supreme Court applied an unreasonable definition of *Chapman* when it resolved witness credibility in declaring the error harmless.

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[16](...continued)
As this Court recognized in Coker v. Georgia, 433 U.S. 584, 597-98 (1977): "Short of homicide, [a criminal sexual assault] is the ultimate violation of self. . . Rape is very often accompanied by physical injury to the victim and can also inflict mental and psychological damage."

For these reasons, certiorari should be denied.

RELIEF REQUESTED

For all of the reasons stated above, Respondent urges this Court to deny the Warden's petition.

Respectfully submitted,

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DATED: May 5, 2000

testimony of all witnesses and giving a witness's testimony such weight as you believe it deserves under all the circumstances you have found to exist in this case. This includes the testimony of police witnesses, such testimony is to be judged by the same standards as any other testimony.

Now, in this case, Dr. Brooks, forensic pathologist, Dr. Sack, family physician and Sergeant Paunovich, fingerprint expert, have given their opinions in the fields of forensic pathology, family medicine and fingerprints. An expert is permitted to give his or her opinion as to matters of which he or she is expert. You're not bound to follow the opinion of any expert, but you have give it whatever weight you believe it deserves.

In determining whether or not to believe the opinion of an expert, you should consider the reasons

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and facts upon which he or she bases his or her opinion; whether or not these facts are true. You should also consider the qualifications and believability of the expert in light of all the evidence in this case.

There have been stipulations of fact in this case. Stipulations of fact are agreed statements of attorneys on the facts. You may regard such stipulated facts as true.

The evidence must convince you beyond a reasonable doubt that the crime occurred on or about November 15, 1987, within the County of Oakland, City of Southfield. The Defendant is charged with the crime of first degree premeditated murder. Any person who

commits a willful and deliberate, premeditated murder is guilty of this charge. The Defendant pleads not guilty to this charge.

To establish first degree premeditated murder, the Prosecution must prove each of the following elements beyond a reasonable doubt:

First, that Frank Peter Madsen died on November 15, 1986 within the County of Oakland, the City of Southfield.

Second, that his death was caused by the Defendant, that is that Frank Peter Madsen died as a result of a stabbing.

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Third, if you find the death was caused by the Defendant, you must determine whether the Defendant is guilty of any crime. The killing of a human being by another maybe entirely innocent. It is not the act of killing in and of itself which makes it a crime, but the state of mind with which it is done.

A killing is not murder if it is justified, excused or if it occurred under circumstances which make the killing the lesser crime of manslaughter.

Fourth, for first degree premeditated murder, you must find proof beyond a reasonable doubt that the Defendant acted with a certain state of mind in causing the death. You must find that the Defendant possessed the following state of mind at the time of the killing:

That the Defendant intended to kill Frank Madsen and that the intent to kill was premeditated.

What does premeditated mean? Premeditated means thought out beforehand or decided or planned, that the killing was deliberate. Deliberate means the Defendant must have considered to pros and cons of that design and chosen her acts. The intent must be formed by a mind that is free from undue excitement. This excludes acts done on sudden impulse, without reflection or as a result of a sudden fight, and that the killing was the result of real, substantial reflection.

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There must be a sufficient lapse of time as would give the mind time to think about the purposes and intent of the killing. The law does not specify the length of that period. And it will vary with individuals and circumstances. The test then, is not the duration of time, but the extent of the reflection. There must be sufficient time to afford a reasonable man time to subject his actions to a second look.

The difference between first degree premeditated murder and second degree murder is that for first degree premeditated murder, the Defendant must have actually intended to kill and have premeditated the victim's death and have deliberately or substantially reflected upon the killing beforehand.

Sufficient premeditation and deliberation is not required for second degree murder. For second degree murder, the Defendant must have actually intended to kill or have intended to do great bodily harm or have created a very high risk of death or great bodily harm, with the knowledge that death or great bodily harm was a probable result.

If you find the Defendant guilty of murder, it is your duty to state the degree in your verdict. That is that she is guilty of first degree murder of guilty of second degree murder,

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When a certain intent is a necessary element in a crime, the crime cannot have been committed when the intent did not exist. Now, intent is the decision of the mind to knowingly do an act with a conscious, fully formed objective of accomplishing a certain, specific result.

Now,, there can be no crime of murder where there is no intent to kill or to do great bodily harm or to intentionally act with a willful, wanton disregard of the consequences.

The burden rests upon the Prosecutor to show beyond a reasonable doubt that the Defendant, at the time of the doing of the alleged act, had the wrongful intent. The intent which a person does an act is known by the way in which he expresses it to others or indicates by his conduct. The intent to which a person does an act can sometimes be determined from the manner in which it is done, the method used and all other facts and circumstances, only if that intent is established by the evidence.

If you find that the Defendant, for any reason whatsoever, did not consciously and knowingly act with the intent to kill or do great bodily harm or to intentionally act with a willful, wanton disregard of the consequences, the crime cannot have been committed.

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You must find the Defendant not guilty of the crime of murder.

If from all the evidence, you have a reasonable doubt as to whether or not the Defendant knowingly and consciously acted with the intent to kill or do great bodily harm or to intentionally act with a willful and wanton disregard of the consequences, then you must find the Defendant not guilty of the crime of murder.

Some instruments are dangerous because they're specifically designed -- so designed and are themselves deadly, such as firearms or bombs. Other instruments, though designed for peaceful and proper purposes, also may be dangerous weapons. The manner in which an instrument is used or intended to be used in an assault determines whether or not it is a dangerous weapon. If an instrument is used in a manner reasonably calculated to produce serious injury or death, it is a dangerous weapon.

You may infer the intention to kill from the use of a dangerous weapon when it is used in such a manner that the death of the person was plainly likely. You may infer a person intended the usual result which follows the use of a dangerous weapon.

You must consider all the facts and circumstances in determine the state of mind of the

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Defendant at the time of the act. This may be inferred from the kind of weapon used, the

nature of the wound inflicted, the circumstances surrounding the killing, the act, the conduct, the language of the accused, or any other circumstances in evidence.

In determine whether a person who has killed another is guilty of murder, the nature and extent of the injury or wrong which was actually intended must usually be of controlling importance. There cannot be a conviction of murder unless the injury intended was one of a very serious character which might naturally, commonly involve the loss of life or grievous mischief.

If all the evidence does not convince you beyond a reasonable doubt that the Defendant either intended to kill or consciously created a high degree of risk of death, with knowledge of the probable consequences, then you must find the Defendant not guilty of the crime of murder.

Now, the crime of murder may be reduced to voluntary manslaughter if the killing is committed under the influence of passion or in the heat of blood produced by adequate provocation, before a reasonable lapse of time for the blood to cool. Manslaughter is distinguished from murder in that with voluntary manslaughter, when the mind or reason of the Defendant

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at the time of the act, is disturbed or clouded by mental or emotional excitement to and extent which might make an ordinary person likely to act rashly or without due deliberation or reflection and from passion, rather than judgment.

Second, the cause of such disturbance

must be something which would cause ordinary persons to act rashly. The law does not state what things are sufficient to produce such a reaction. Anything which would naturally tend to produce such a state of mind in ordinary persons is sufficient. If the Defendant suffers from some peculiar weakness of mind of infirmity of temper, you may take this into consideration.

Third, the killing must result from such provocation or passion. That is, the killing must have occurred before a reasonable time had elapsed for the blood to cool and for reason to resume its control. No precise time can be laid down. The test is whether or not a reasonable time had elapsed under the particular circumstances.

One of the defenses raised in this case is that the Defendant acted in lawful self defense. That law recognizes the right of a person to use force or even take a life in defense of his own person under certain circumstances.

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When persons act in a lawful self defense, such acts are excused and the Defendant is not guilty of any crime.

In considering whether or not the Defendant acted in lawful self defense, you should consider all the evidence in light of these following rules:

First, at the time of the act, the Defendant must have believed he was in danger of being killed or of receiving serious bodily harm. If he so believes he may immediately act and defend himself, even to the extent of taking a human life if necessary. Although it may now

turn out that the appearances were false and that he was mistaken as to the extent of the real danger, he is to be judged by the circumstances as they appeared to him at the time of the act.

Second, the degree of danger which must be feared is serious bodily harm or death. A person is not justified in killing or inflicting great bodily injury upon another in order to protect himself from what appears to be slight or insignificant injury. Deciding whether at the time the Defendant feared for his life or safety, you should consider all the surrounding circumstances, the conditions of the parties, including their relative strength, whether the other party was armed with any dangerous weapon, or had other means

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to injure the Defendant,, the nature of the threat or attack of the other party, previous acts of brutality or threats of the other party which the Defendant was aware.

Third, the act or acts taken by the Defendant must have appeared to the Defendant at the time, to be immediately necessary. A person is justified in using only such amount of force as may appear necessary at the time to defend himself from danger. In considering whether the degree of force appeared to be necessary, you should consider the excitement of the moment, what alternatives the Defendant knew existed. A defendant in a state of excitement is not held to fine distinctions of judgment about how much force is necessary for him to use to protect himself.

Now, the law requires a person to avoid using deadly force if he can safely do so. If the Defendant could have safely retreated but did

not do so, his failure to retreat is a circumstance which you may consider, together with all other circumstances, in determine whether he went further in repelling the danger than he was justified in doing.

However, if the defendant believed that he was in danger of death or serious bodily harm and that deadly force was immediately necessary to repel such danger,

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he was not required to retreat or to consider whether he could safely retreat. He was entitled to stand his ground and use such force as he believed immediately necessary to protect his person.

The Defendant is not required to prove that he acted in self defense. The Prosecution has the burden of proof of guilt beyond a reasonable doubt, and this includes the responsibility of proving that the Defendant was not acting in self defense.

When you begin to deliberate, you should first consider the offense of murder. If you are unable to agree on a verdict with regard to that offense, you may turn to consideration of the lesser offense of voluntary manslaughter. It is up to you to decide how long to consider the offense of murder before turning to consideration of the offense of voluntary manslaughter. You may return at any time to consideration of the greater offense or the lesser offenses.

When you go to the jury room, your deliberations should be conducted in a businesslike manner. You should first select a foreperson. He or she should see that

discussion goes forward in a sensible and orderly fashion and that each juror has the opportunity to discuss the issues fully and fairly.

A verdict in a criminal case must be

unanimous. In order to return a verdict, it is necessary that each of you agree upon that verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual, considered judgement of each juror.

It is your duty to consult with your fellow jurors and to deliberate with a view to reaching an agreement, if you can do so without violating your own judgment.

Before deciding the case, give impartial consideration to the views of your fellow jurors. This means that you should give respectful consideration of one another's views and talk over differences of opinion in a spirit of fairness and frankness.

It is natural that difference of opinion will arise. When they do, each of you should not only express your opinion, but also the facts and reasons upon which you base it. By reasoning the matter out, it is often possible for all the jurors to agree.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced that it is wrong.

However, none of you should surrender

your honest conviction as to the weight and effect of the

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evidence or lack of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Do not concern yourselves during the trial or in your deliberations with what the penalty might be if you should find the Defendant guilty. The question of guilt and the question of penalty are decided separately. It is the duty of the Judge to fix the penalty whenever a defendant is found guilty. Possible penalties should not influence your decision.

If you wish to communicate with the Court while you are deliberating, please have your foreman write a note and deliver it to the bailiff. It is not proper to talk directly with the Judge, attorneys, court officers, or other persons involved in the case, even if the discussion has nothing to do with the case.

During your deliberations, you must not disclose the state of your deliberations to others outside the jury room. Therefore, unless you reach a verdict, do not disclose this information, even in the courtroom.

If you wish to examine more closely the Exhibits which have been admitted into evidence while you are deliberating, please have your foreperson write a note and give it to the bailiff. The Exhibits will then

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be given to you, and you may examine them in the jury room.

You will be given a verdict form to assist you in your deliberations. A practice that is not used throughout the system, one which I practice, I give the instructions to the jurors. Each one of you will have your own copy of the instructions. Those instructions and your notes should remain in the jury room any time you leave the jury room.

These instructions, as you're able to read them, hopefully will give you an opportunity to stand back and look at them in a reasonable fashion.

We do have 13 jurors. As I indicated at the commencement of this case, one juror will be drawn off by lot.

Will both Counsel approach the Bench?

(Discussion at the Bench.)

THE COURT: I'll ask my Clerk, our Ms. Brooks, to go and choose the juror at random.

THE CLERK: Juror 78, Ann Harold.

THE COURT: Would you go into the jury room, get your things and wait in my Chambers and I'll speak to you briefly. Thank you.

(Juror from seat number 4 excused.)

THE COURT: You may now go into the jury room.

Q Other than the statuette?
A That is correct.
Q The desk we saw in the video tape, that would be this item?
A Yes.
Q This would be the side table?
A Yes.
Q This would be the couch where the hat was located?
A Yes.
Q The easy chair?
A Yes.
Q Now, in the video tape, there were recognizable as almost three distinct pools of blood, would you agree with that?
A Yes.
Q Would it be true that he was found with his head about in the position as the end of my finger, with a larger pool of blood to his right?
A Yes.
Q A trail of blood back to a pool of blood in this corner?
A Yes.
Q Trail of blood back just outside the doorway to the closet?
A Yes.
Q Is this the closet door that had the circular bloody

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are taken. Then the autopsy is finally conducted.

Q Does the autopsy begin with an external examination?

A It does, indeed.

Q Now, Doctor, after you complete an autopsy, do you prepare an autopsy report or autopsy protocol?

A Yes, I do.

Q And you have that with you; is that correct?

A Yes, I do.

If, during your testimony, you feel the need to refer to that, I just would ask you indicate you're referring to your report.

A Certainly.

Q With regard to the individual you did the autopsy on November 7th at 10:30, Frank Peter Madsen, can you give, first of all, a general description of the individual, that is as to size, age, weight, et cetera?

A Certainly. This was an average sized, perhaps slightly above average stature, more or less average weight, Caucasian male. He appeared the stated age of 81 years. The bode was 70 inches long.

Q Seven, zero inches?

A Seven, zero inches.

Q Five foot ten?

A Yes.

Q Please continue.

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A And the weight was 280 pounds. So you could vacillate between whether this was the upper limits of average or slightly obese.

Q And, any other general observations of the individual before you began looking for wounds or what-have-you?

A Well, nothing other than this individual appeared to be the senior age stated of 81 years. The hair was thinning, there was graying, such things as

that. But, other than the trauma which I presume we'll talk about in a moment, there wasn't anything unusual.

Q Let's go to the unusual. Can you describe, first of all, from your external investigation or observations, the apparent wounds to the person of Frank Peter Madsen?

A This man had, basically two aggregates of injury. One group of injuries were blunt trauma, a blow generated by a blunt object generating lacerations of the scalp and the underlying soft tissues about the left side of the head, about the left ear and over the back of the skull.

Q Okay. Did you, in your observations, make a -- count how many there were?

A It was my considered opinion that at least ten blows were struck. There may have been others.

Q Okay. Can I assume from that, you saw at least ten lacerations?

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A Yes.

Q Would you describe what you mean by blunt force lacerations?

A The skin had been pressed inwardly and the edges pushed apart so that the skin margins were ragged, they were torn rather than incised or cut. There was bruising associated with these, opening of the skin and hemorrhaging so that you would have to conclude that these were injuries which were created by an object which did not have necessarily a particularly sharp surface. Therefore, blunt. trauma.

Q Some sort of club: or blunt instrument?

A Yes.

Q The blows were of sufficient force to cause the skin to split?

A Yes.

Q What were the depth of the injuries?

A These were shallow wounds, although they extended into the fatty tissues beneath the scalp.

There was extensive underlying trauma. No fracture of the skull or a significant bleeding between the brain and the skull.

Q Was there bruising of the brain?

A Yes, there was bruising of the brain, limited.

Q There were no fractures of the skull, no breaking of

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the bone?

A No, no fractures.

Q Was there tissue damage down to the skull?

A Yes.

Q Doctor, I have had this marked as People's Proposed Exhibit 1.

MR. SPIEKERMAN: I would ask Mr. Campbell if he has any objection to its admission. If not, I'll move --

MR. CAMPBELL: (Interposing) We do not object. We agree to its admission.

THE COURT: It is so admitted. Proposed Exhibit what?

MR. SPIEKERMAN: One, Your Honor.

MR. CAMPBELL: We concede this was used by my client to hit the Reverend Madsen and that she stabbed him with that knife which we'll agree to the admittance of now.

MR. SPIEKERMAN: Proposed Exhibit 2, I'll move for its admission.

THE COURT: Thank you.

Q (By Mr. Spiekerman): Let me hand you now, Exhibit 1. I'll ask you if that implement is consistent with the blunt trauma injuries that you saw on or about the skull of Frank Peter Madsen?

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A They could have been created with such an instrument.

Q Thank you very much.

Now, Doctor, let me show you Proposed Exhibit 29 and 30. I'll ask, first of all, if you can identify

those?

A Yes this bears our case number and our autopsy number concerning investigation of this deceased individual.

Q Are they fair and accurate representations of the head wounds you have described for us?

A Yes.

MR. SPIEKERMAN: At this time, Your Honor, I do move for their admission. I believe Mr. Campbell has had the opportunity to see them. I'll show them to him again, if he so desires.

THE COURT: Mr. Campbell?

MR. CAMPBELL: No objection.

THE COURT: Thank you.

MR. CAMPBELL: My objections were previously made.

THE COURT: That exception is on the record. Twenty-nine and thirty, with the exceptions, are admitted on the record.

MR. SPIEKERMAN: With the Court's permission, I'll give them to the jury.

THE COURT: Mr. Campbell?

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MR. CAMPBELL: No objections.

THE COURT: Fine, thank you. They may be moved among the jurors.

MR. SPIEKERMAN: I'll hand them to the first juror and ask they pass them down. When you've completed with them, set them here (indicating).

(Exhibits passed among the jurors.)

Q (by Mr. Spiekerman): Now, Dr. Brooks, let me back up just a moment. In doing the external observations do you categorize any jewelry the deceased might be wearing?

A Yes.

Q Tell us in regard to Dr. Madsen, what items he had on him?

A I believe I can. The jewelry consisted of a white metal watch on his left wrist. White metal would refer to the casing, the outer structure of the watch.

A white metal ring with a blue/green stone on the fourth finger of the right hand and a yellow metal lodge ring, in quotation marks, on the fourth finger of the left hand. A yellow metal chain about the neck.

Q That would be the jewelry he had on then, watch, rings and yellow metal chain?

A Yes.

Q Did you make conclusions as to whether these were gold

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or silver?

A We don't do that. I can't tell you whether these were aluminum or 14 carat.

Q Doctor, let's get back to the wound you observed. In addition to the wounds about the head, were there wounds about the face?

A Yes.

Q Describe any injury to the face that you observed?

A There were abrasive injuries across the bridge of the nose and about the eye and toward the side of the left cheek and jaw.

Q Okay. Now, Dr. Brooks, let me ask you this: The abrasive injuries across the bridge of the nose, could they be caused by a person's glasses, such as my glasses, being forced against the nose?

A Yes.

Q Let me show you Proposed Exhibit Number 8 and ask you, glasses such as these could cause such an injury?

A Yes.

Q Excuse me, that is Proposed Exhibit 5, I stand corrected.

A Yes, a pair of eye glasses such as this certainly could create the injury as described.

Q You also stated, did you not, there were abrasions to the cheek.

A Yes.

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Q Let me ask you this, if someone were to fall forward in this manner (indicating), striking their face and head against the wall, would that be consistent with the injuries that you saw?
A Yes.
Q Continue, what other injuries did you see about the person of Frank Madsen?
A The other major area of trauma was a cluster of stab wounds which were in an oval, roughly circular but not quite, in a regular oval area, situated between the upper portion of the left arm pit or axilla.
Q Let me ask you to continue. Use me for a model so the jurors may see.
A Very well. These wounds were clustered --
THE COURT: (Interposing) Can you see, Mr. Campbell
MR. CAMPBELL: Yes.
THE WITNESS: In an oval area that lay between the upper portion of the arm pit, the left axilla and the later margin of the left shoulder blade. In here (indicating). And they they occupied an area of approximately this (indicating).

Q (By Mr. Spiekerman): Just for the record, would you make that?
A We're looking at a ring of about --

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Q (Interposing): A circle five inches across?
A Four and a half or five- inches. There were a number of wounds in this area, some 32, 31, 32 such wounds were located in this area.
Q How would you describe such wounds?
A Those were stab wounds. Puncture wounds.
Q, Let me ask you if such wounds would be consistent with the knife, having been made with the knife such as Exhibit 2?
A Yes, our measurements of the wounds, we attempted to average, indicated the weapon or

instrument utilized was one which would create -- well, that had one sharp edge, one dull edge blade, approximately 3/4 of an inch wide and capable of inflicting a wound approximately five inches in depth.

Q Is that knife consistent with that?

A It is.

Q Doctor, can a knife inflict a wound deeper than the length of its blade?

A It can.

Q Explain that, please.

A There are soft tissues which compress and collapse underneath a thrust of an instrument or weapon such as this Exhibit. Even the rib cage can fold or be compressed to a degree. And the force of the thrust

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and a number of other things therefore, would govern a wound that plunged an inch or an inch and a half deeper than the blade that created it.

Q In addition to the thirty wounds you found, were any other stab wounds located on the person of Dr. Madsen?

A Yes, there were.

Q Where were they?

A There were, I believe three other isolated stab wound entitles, two in the right posterior shoulder area and one in the left deltoid area.

Q Demonstrate on your person.

A There were two in this area of the right back (indicating), and one in the left arm, about this area (indicating). None of these were of any consequence, they didn't penetrate the body cavity.

Q Were there any marks alongside this area of stab wounds indicating where the knife -- the major portion of the body and sliced along the rib cage?

A Some of the wounds were deflective, they did penetrate soft tissue. Not all of the wounds penetrated the thorascic cavity, only a few of

them.

Q Any other wounds that you recall on or about -- I forgot to ask, did he have wounds on the front of him?

A Yes, there were some scratches across the anterior chest, scratches, abrasive lacerations, if you will. One

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linear scratch across the front of the chest on the left, about four inches in length. Could have been caused by anything. I have no idea. There were some abrasive scratches and contusive or bruised lesions over the back of the right hand, over the knuckles.

Q The knuckles had been scraped?

A Yes.

Q Scraped ~against a wall?

A More than scraped, there was underlying soft tissue bruising and bleeding.

Q They encountered something hard; is that what you're saying?

A Yes, one would presume some degree of force was enacted in the creating of these scrapes.

Q Consistent with being struck with an object such as Exhibit 1?

A Yes, or with a wall or a floor or almost anything.

Q Just to be complete before we go to the internal examination, is there anything else you recall or is that it?

A That is, in the main, everything of consequence, sir.

Q After you make the external observations of the injuries, what do you do next?

A Once we have this photographed and documented and described, we open the body in a conventional manner,

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a surgical procedure, and we expose the body cavities and we take the organs out one at a time and look at them to see if we can reconstruct either

disease process or trauma or whatever occurred. And we try to document this and insofar as possible.

Q Now, Doctor, given the fact the Reverend or Dr. Madsen was 81 years old, did you see any natural occurring disease processes occurring in the body?

A Well, yes.

Q Tell us about those, please?

A He had arteriosclerotic vascular disease, hardening of the arteries which was in keeping with his age. I found nothing accelerated, neither did I find them unusual for a man of 81 years old.

Q Do you recall anything else that you found?

A No, nothing of consequence, other than the trauma.

Q Tell me, this would -- did you or would you be able to find any evidence as to whether or not Reverend Madsen was a diabetic?

A This is extremely difficult on the basis of both anatomic and chemical or clinical pathologic assay in a body such as we have to work with in this instance. All kinds of things happen to blood glucose after death and that is what you utilize fundamentally, for a basis of diabetes, is the level of blood sugar at

the point in time, if you know the history. I would say it would be extremely difficult to ascertain whether this man was or was not a diabetic or how severe it might have been.

Q Did you see any past scars on the body that would indicate any previous surgical history, if you recall?

A I don't believe I did. I don't believe we recorded any. Yes, we did.

Q Okay.

A Referring to my notes, there is a right upper quadrant subcostal scar utilized in the surgical approach to the gall bladder which would be here (indicating). Just under the rib cage on the right side.

Q Were there any other prominent marks or scars or masses on the body?
A No.
Q Would you continue with your internal examination with regard to the injuries that Dr. Madsen suffered? What was revealed to you by your examination?
A Well, a number of the stab wounds from the left back had penetrated the upper portion of the thorax and the instrument creating these wounds had penetrated the thorasic cavity on the left. Several of the thrusts had perforated the lung which allowed two things to happen, blood to exude and air to exude.

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Hemopneumothorax developed on the left side of the chest. Hemo is blood, pneumo is air. The combination filled the cavity and collapsed the left lung.
Q You testified to over thirty stab wounds to the back. Do you have an estimation of how many of them actually penetrated into the lung?
A Well, that is very difficult. Inasmuch as these wounds had become confluent.
Q What does that mean?
A They had merged together. Two or three wounds had sort of merged to created one penetration. So an exact estimate was rather difficult. On the basis of the number of times the lung was penetrated, this would be three to five times.
Q How many actually penetrated into the thorascic cavity there, how many got through the rib cage?
A I have no idea.
Q It would obviously have to be more than three to five.
A Yes.
Q Do you have any idea how many more?
A Eight, perhaps, more or less.
Q Now, to penetrate the cavity, the knife wound had to go between the ribs; is that correct?

A Some of them went between the ribs. So some of them damaged ribs on the way through.

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Q Actually clipped the ribs?
A Incised rib tissue. The bone is surprisingly soft, it will cut.
Q This is a rather large portion of the ribs back here.
A Yes.
Q What are the gaps between them? Can you describe that portion?
A The intercostal spaces vary up and down the rib cage. In this area it is about, well, a little less than a half an inch apart.
Q The ribs themselves, how wide are they?
A About the same distance.
Q Any -- did your internal investigation illuminate anything with regard to the wounds about the head or the face?
A The wounds about the head and face, I did not construe to be lethal inasmuch as there was no blood between the brain and the skull nor was there a fracture. Therefore, although they might have -- I don't know, this is speculation, they might have rendered the deceased unconscious from bruising of the brain.
Q There was bruising of the brain; is that correct?
A Yes, there was.
Q In how many areas?
A A small area directly underneath the majority of the trauma which was in the left temple area and a small

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area on the opposite side on the right which was a bouncing, if you will, of the brain back and forth in the bony cavity of the skull.
Q Doctor based on your examination, did you form opinions as to which series of injuries occurred first, the blows to the head or the stab wounds?

A No, I didn't draw that conclusion. I could speculate, but . . .
Q I would ask you, based on your expertise, to speculate.
A I would think this man was struck about the head and face prior to the infliction of the stab wounds.
Q Is that because the stab wounds, in your opinion, are the death dealing wounds?
A Yes.
Q So, when struck in the head, there was still bruising, bleeding?
A Yes.
Q The heart was still pumping.
A Yes.
Q That is your opinion as to the cause of death?
A This man died as a result of stab wounds to the left thorax. The stab wounds caused the hemorrhage -- the blood and air to escape between the lungs and chest wall causing the collapse of the left lung and thereupon created a lethal situation.

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Q Doctor, let me ask this: Do you do blood scans per autopsy with the intent of determining whether there was drugs or alcohol present in the blood at the time of death?
A Yes.
Q What was the result?
A Nothing, no alcohol, no unusual substances in the blood.
Q Did you, based on your full investigation that included photographs, history, et cetera, in addition to your inspection of the body; is that correct?
A Yes.
Q Did you, based on your full investigation, make an estimation as to the time of death?
A Yes.
Q What was that?
A The best we could do was the p.m., the evening hours of November the 5th, '86.

Q Doctor, let me once again hand you Exhibit 1. It is not all that heavy; is that correct?
A No.
Q Would it be possible to fracture a skull with an implement such as that?
A I think it would be possible, I think it would be difficult.
Q Okay.